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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

No. ____

October Term 1986

HERMAN E. McMAHAN and
CHARLES D. PRICE,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I.

I. The United States Court of Appeals held as a matter of law that the Defendants had not committed embezzlement, as defined in 29 U.S.C. 501(c), and set aside convictions based on that statute. The mail fraud counts in the indictment allege the identical embezzlement which the Court of Appeals held did not occur, and the jury verdict of guilty of mail fraud could have been based on a finding of embezzlement. In light of the decision of this Court in Yates v. United States, 354 U.S. 298, which held that in a criminal case, when a jury verdict is supportable on one ground, but not on another, should the United States Court of Appeals for the Fourth Circuit have set aside the jury verdicts of guilty of mail fraud?

II. Did the Court below err in holding that the Mail Fraud Statute could be violated by a union official based upon allegations of breach of a fiduciary duty involving intangible benefits to the union members, in the absence of an allegation or proof of economic harm to the protected class, which decision of the United States Court of Appeals for the Fourth Circuit is in conflict with the holdings of the United States Courts of Appeals for the Third, Fifth and Eighth Circuits, in the cases of United States v. Boffa, 688 F.2d 919 (3rd Cir. 1982), United States v. Ballard, 663 F.2d 534 (5th Cir. 1981) mod. on reh., 680 F.2d 352 (1st Cir. 1982), and United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978)?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Herman E. McMahan and Charles D. Price, who were jointly convicted by a jury in the United States District Court for the District of South Carolina, for certain crimes, and received sentences of incarceration, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Fourth Circuit denying the Petition for

Rehearing and refusing the Suggestion for Rehearing En Banc, filed on August 20, 1986, is appended hereto as Appendix B at page 35.

The Opinion of the United States Court of Appeals for the Fourth Circuit, decided April 14, 1986, affirming the convictions for mail fraud, but reversing the convictions for violation of 29 U.S.C. §501(c), which opinion affirmed the sentences of imprisonment rendered in the United States District Court, which were concurrent sentences, reported at United States v. Price, 788 F.2d 234 (4th Cir. 1986), is appended hereto as Appendix A at page 19.

JURISDICTION

The Petition for Writ of Certiorari is for review of the judgment of the United States Court of Appeals for the Fourth Circuit in a criminal prosecution in which the indictment alleged violation of 29 U.S.C. §501(c) and 18 U.S.C. §1341. By Order filed August 20, 1986, the Petitions of the United States and of the Petitioners herein for Rehearing and Suggestion for Rehearing En Banc were denied.

This Court has jurisdiction to review the opinion rendered below pursuant to the provisions of 28

U.S.C. §1254(1).

CONSTITUTIONAL OR STATUTORY

PROVISIONS INVOLVED

1. 18 U.S.C. §1341 which provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any countefeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

2. 29 U.S.C. 501(c) which provides:

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

STATEMENT OF THE CASE

This case is a criminal prosecution which originated in the United States District Court for the District of South Carolina, with the return of a multicount indictment charging violation of the Mail Fraud Statute, 18 U.S.C. §1341, and embezzlement in alleged violation of 29 U.S.C. §501(c). The two Petitioners are each business agents of the International Association of Bridge, Structural and Ornamental Iron Workers Union, McMahan of Local 601, Charleston, South Carolina, and Price of Local 808, Orlando, Florida.

The indictments generally alleged a conspiracy or scheme whereby McMahan would accept for membership in Local 601 in Charleston, South Carolina, persons who paid an extra monetary consideration to him personally, and that Petitioner Price assisted in this scheme, and received some of the money.

The mail fraud case was prosecuted on the theory that a union official owed a fiduciary duty of good and faithful service to the members of his Local, and that Price and McMahan used the mails in a scheme to deprive these union members of the intangible benefits of their right to good and faithful service.

The counts of the indictment alleging a violation of 29 U.S.C. §501(c) claimed that International Union Form 7, the membership application, was embezzled or converted by Price and McMahan.

The trial judge instructed the jury on the mail fraud counts that it was not necessary for the government to prove economic harm. The Court of Appeals for the Fourth Circuit approved this position. "An elected union official who owes the union members and the public in general faithful and honest services should not be treated any differently, not held to any different standard. In such a case economic injury need not be shown because the harm caused lies in the fact that the public official is not exercising his independent judgment in passing on official matters." United States v. Price, 788 F.2d 234 at 237.

The Court of Appeals for the Fourth Circuit did hold that there was no evidence of converting of union property, Form 7, the application form, to their own use by these Petitioners.

> In this case there is no evidence of any converting to their own use by either appellant. There were no false or fraudulent applications. There was no evidence the forms were taken and converted to any use other

than the use called for by the union. There was no embezzlement of the forms as charged in the indictment. The offense in this case was the receiving of additional fees in connection with the proper application procedure, but not embezzlement as charged under 29 U.S.C. §501(c).

The indictment contained 16 counts of mail fraud, and in each of the counts the object of the mail fraud scheme was alleged to be as follows:

> 17. That during the period from on or about July, 1979, and continuing to on or about August, 1981, the exact dates to the Grand Jurors unknown, HERMAN E. McMAHAN, MARY O. THOMPKINS, CHARLES D. PRICE, ROBERT McCLEARN and WILLIAM ROUSE, knowingly and willfully devised and intended to devise a scheme and artifice to defraud:
>
> a. The Iron Workers Union and its members of their right to the conscientious, loyal, faithful, disinterested and unbiased services, decisions, actions and performance of official duties by HERMAN E. McMAHAN and CHARLES D. PRICE, in their official capacities as business agents of Locals 601 and 808 respectively, free from corruption, partiality, willful omission, bias, dishonest, official misconduct, conflict of interest and fraud.
>
> b. Local 601 and its members of their right to the property and assets of said Local, to wit: Form No. 7, free from corruption, misuse, fraud and willful omission and misstatement of fact.
>
> c. Local 601 of the Iron Workers Union and its members of their right to have the business of Local 601 conducted honestly, impartially free from deceit, trickery,

corruption, fraud, undue influence, dishonest and conflict of interest.

d. Local 808 of the Iron Workers Union and its members of their right to have the business of Local 808 conducted honestly, impartially, free from deceit, trickery, corruption, fraud, undue influence, dishonesty and conflict of interest.

App. in Court of Appeals, p. 4-5

Accordingly, one of the four objects of the scheme to defraud, one of which must be proved beyond a reasonable doubt to allow for a conviction, included "a scheme and artifice to defraud: (b) Local 601 and its members of their right to the property and assets of said Local, to wit: Form No. 7, free from corruption, misuse, fraud, and willful omission and misstatement of fact." App. in Court of Appeals, p.4.

REASONS FOR GRANTING THE WRIT

I.

The United States Court of Appeals held as a matter of law that the Defendants had not committed embezzlement, as defined in 29 U.S.C. 501(c), and set aside convictions based on that statute. The mail fraud counts in the indictment allege the identical embezzlement which the Court of Appeals held did not occur, and the jury verdict of guilty of mail fraud could have been based on a finding of embezzlement. In light of the decision of this Court in Yates v. United States, 354 U.S. 298, which held that in a criminal case, when a jury verdict is supportable on one ground, but not

on another, should the United States Court of Appeals for the Fourth Circuit have set aside the jury verdicts of guilty of mail fraud?

The indictment upon which these Petitioners were convicted, in paragraph 17(b), alleges that the scheme and artifice to defraud, for which the mails were used, was to defraud "Local 601 and its members of their right to the property and assets of said Local, to wit: Form No. 7, free from corruption, misuse, fraud and willful omission and misstatement of fact."

The guilty verdicts of the jury were general verdicts, and the jury found these Petitioners guilty both of the mail fraud counts in the indictment, submitted to them by the trial judge, and of the embezzlement counts pursuant to 29 U.S.C. §501(c).

Inasmuch as the jury, in those counts of the indictment specifically directed to the embezzlement outlawed in 29 U.S.C. §501(c), found these defendants guilty, it must be assumed that they also found, in the mail fraud convictions, that one of the purposes of the mail fraud, was the embezzlement of Form No. 7. The verdict being a general one, there is no way to ascertain whether or not they also found these Petitioners to have entered into a scheme for the purposes set forth in

subparagraphs a, c and d of paragraph 17 of the mail fraud indictment.

This uncertainty, coupled with the fact that the Court of Appeals held, as a matter of law, that no embezzlement of Form 7 took place, mandates a new trial as to the mail fraud counts.

The United States, in its brief in the United States Court of Appeals, in response to the argument, addressed in Question II herein, that economic loss or injury is essential to a finding of mail fraud, likewise relied upon the alleged embezzlement of Form 7, which the Court of Appeals held not to have been embezzled, to supply the proof of economic loss or injury, if such were to be required by the Fourth Circuit. There, the United States argued to the Court of Appeals:

> Appellants Price and McMahan contended inasmuch as the mail fraud counts of the Indictment alleges scheme to defraud the union of their "faithful and honest services," the government was required to prove economic loss or injury to the union as an element of mail fraud. Appellants failed to mention that the mail fraud scheme also alleges a scheme to defraud Local 601 and its members of their right to the property and assets of the Local, to wit: Form 7, free from corruption, misuse, fraud, and willful omission and misstatement of facts. (Brief of the United States in the United States Court of Appeals at page 14.)

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

This Court, in Yates v. United States, 354 U.S. 298, reversed the Defendant's conviction for violation of the Smith Act and held that advocacy of the overthrow of the Government was a valid crime, but organization of the communist party, was not. Both were alleged in the indictment, and this Court held that while a conviction for advocacy could be sustained, because organization was also submitted to the jury, a new trial was necessary.

> In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected. Stromberg v. California, 283 U.S. 359, 367-368; Williams v. North Carolina, 317 U.S. 287, 291-292; Kramer v. United States, 325 U.S. 1, 36, Note 45.

The United States Courts of Appeal have consistently applied this rule. In United States v. Boffa, 688 F.2d 919 (3rd Cir. 1982), an intangible rights-fiduciary duty case, the Court held that Section 7 of the National Labor Relations Act, 29 U.S.C. 157, did not create such a fiduciary duty or a right to intangible benefits, so as to be subject to the mail fraud statute. Because Section 7 rights were included in some of the counts of the indictment, a reversal became necessary, so that a new trial could be had on the proper portions of those counts

of the indictment.

In United States v. Moynagh, 566 F.2d 799 (1st Cir. 1977), the count of the indictment in question listed several allegedly criminal omissions from a bankruptcy schedule. The Court of Appeals held that since one of them did not constitute a crime, and since it was submitted to the jury, reversal of the entire count was necessary.

> The difficulty here is that the specification regarding the Cannon debt was improperly submitted to the jury and therefore the verict is ambiguous. Under similar circumstances the Court observed in United States v. Natelli, 527 F.2d 311 (2d Cir. 1975) cert. denied, 425 U.S. 934, 96 S.Ct. 1663, 48 L.Ed.2d 175 (1976): "A difficulty does arise, however, if it is found as a matter of law that there should have been a directed verdict for defendant on one of the specifications for insufficiency of evidence. The verdict then becomes ambiguous, for the jury could have rejected the specification which the appellate court holds sufficiently proved, and have convicted only on the specification held to be insufficiently proved. In that event, there seems to be no alternative to remand for a new trial. That is the general principle."

In United States v. Kavazangian, 623 F.2d 730 (1st Cir. 1980), faced with a similar proposition, the Court held:

> However, even if the jury's verdict was supportable on either or both of these grounds, it is impossible to conclude that the

conspiracy convicted was not based on the Section No. 1324(a)(4) charge. Faced with such an "ambiguous" verdict, we are compelled to reverse the conviction under count 1 as well and remand for a new trial. See, e.g., Yates v. United States, 354 U.S. 298, 311-12, 77 S.Ct. 1064, 1072-73, 1 L.Ed.2d 1356 (1957); United States v. Moynagh, 556 F.2d 799, 804 (1st Cir. 1977), cert. denied, 435 U.S. 917, 98 S.Ct. 1475, 55 L.Ed.2d 510 (1978); United States v. Natelli, 527 F.2d 311, 325 (2d Cir. 1975), cert. denied, 425 U.S. 934, 96 S.Ct. 1663, 48 L.Ed.2d 175 (1976).

Inasmuch as the jury convicted these Petitioners of embezzlement of Form 7, it is certainly likely that the embezzlement of Form 7 was likewise found by the jury to be a purpose of the scheme of mail fraud. Because of the general verdict, it might have been the only object found by the jury to be the object of the mail fraud scheme. Because of the ambiguity thereby created, under settled principles, both in the decisions of this Court, and in the Courts of Appeals, these Petitioners are entitled to a new trial, upon an indictment from which embezzlement of Form 7, as an object of the mail fraud scheme, has been deleted. Accordingly, this Court should grant this Petition for Writ of Certiorari, and reverse the convictions of mail fraud, and remand for a new trial.

II.

Did the Court below err in holding that the Mail Fraud Statute could be violated by a union official based upon allegations of breach of a fiduciary duty involving intangible benefits to the union members, in the absence of an allegation or proof of economic harm to the protected class, which decision of the United States Court of Appeals for the Fourth Circuit is in conflict with the holdings of the Courts of Appeals for the Third, Eighth and Old Fifth Circuits, in the cases of United States v. Boffa, 688 F.2d 919 (3rd Cir. 1982), United States v. Ballard, 663 F.2d 534 (5th Cir. 1981) mod. on reh., 680 F.2d 352 (1st Cir. 1982), and United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978).

In this case, the United States Court of Appeals followed its decision in United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979), Rehearing En Banc, 602 F.2d 653 (1979), Pet. for Rehearing En Banc, 709 F.2d (1979), cert. den. 445 U.S. 961, and held, as the trial judge instructed the jury, that "economic injury need not be shown" where there is a violation of the general duty of faithful and honest service. United States v. Price, 788 F.2d 234 at 237. This holding is not authorized by 18 U.S.C. 1341, and this construction is inconsistent with the holdings of the Courts of Appeals for the Third, Eighth and Old Fifth Circuits.

Economic loss or injury is an essential element of the crime of mail fraud of intangible rights such as an

employee's "faithful and honest services" by a union official under 29 U.S.C. §501(c), which must be both alleged and proven. See, United States v. Ballard, 663 F.2d 534, 540 (5th Cir., 1981); mod. on reh., 680 F.2d 352 (1st Cir., 1982); United States v. Rabbitt, 583 F.2d 1014, 1024-1025 (8th Cir., 1978); United States v. Boffa, 688 F.2d 919, 926-930 (3rd Cir., 1982); et al.

With regard to the use of the mail fraud statute to punish fiduciary breaches of honest and faithful services, by the official accepting supplemental payments, the Eighth Circuit held in United States v. Rabbitt, 583 F.2d at 1024-1025:

> This concept offers a broad interpretation of the mail fraud statute applicable in situations in which the official commits fraud in connection with an affirmative duty of his office. The concept of fraud upon the public may clearly fall within the ambit of the mail fraud statute where dishonest conduct by a public official directly implicates the functions and duties of that official's public office. Whether a showing of dishonesty on the part of a state official, outside his official duties, with no financial loss to the state constitutes a fraud upon the public and thereby statutory mail fraud is, in our judgment, highly questionable. Every case of breach of public trust and misfeasance in office in connection with which some mailing has occurred does not and cannot fall within the confines of the mail fraud statute. In the

instant case, we hold the evidence does not establish mail fraud within the federal statute.

The Fifth Circuit in 1981 had also rejected the view that the Mail Fraud Statute, 18 U.S.C. §1341, is violated if no economic harm is done. As expressed in United States v. Ballard, 663 F.2d at 540:

> Under the facts of this case, though, we find that government's theory sweeps too broadly and does not correctly reflect the quality and quantity of fraud necessary to invoke the criminal sanctions of §1341. All fiduciary breaches, it seems, could be found to involve the loss of an intangible — an employee's faithful and honest services. But, as the Seventh Circuit has stated, "[n]ot every breach of fiduciary duty works a criminal fraud." United States v. George, 477 F.2d 508, 512 (7th Cir. 1973). We believe that a breach of fiduciary duty can constitute an illegal fraud under §1341 only when there is some detriment to the employer.
>
> * * *
>
> . . .[T]he acceptance of kickbacks and concealment of the scheme here could not be considered to have been in furtherance of a mail fraud, for such conduct, though perhaps subject to criticism, would be consistent with non-fraudulent activities; the appellants could have simply been involved in a non-criminal back-scratching scheme. 663 F.2d at 543.

And the Third Circuit, in United States v. Boffa, 688 F.2d 919, 926-930 (3rd Cir. 1982) in a union context said that a scheme to defraud union members of

certain intangible rights, not resulting in economic loss, cannot constitute mail fraud.

It appears to be Congress's intent to require that an economic loss or detriment to constitute a fiduciary criminal violation of the Landrum-Griffin Act. Recent legislation to Title 29 of the United States Code (29 U.S.C. §504, effective October 12, 1984) indicates a clear Congressional intent that actual "economic loss or injury" suffered by the union is an essential element of 29 U.S.C. §501(c). That new section states:

> Any felony involving abuse or misuse of such persons' position or employment in a labor organization or employee benefit plan to seek or obtain an illegal gain at the expense of the members of the labor organization or the beneficiaries of the employee benefit plan, or conspiracy to commit any such crimes or attempt to commit any such crimes, or a crime in which any of the foregoing crimes is an element, shall serve or be permitted to serve —
>
> > (1) as a consultant or deviser to any labor organization,
> >
> > (2) as an officer, director, trustee, member of any excutive board or similar governing body, business agent, manager, organizer, employee, or representative in any capacity of any labor organization. (Emphasis added)

The evidence at trial overwhelmingly shows that McMahan and Price transformed their respective

locals from near-bankrupt labor associations to wealthy financial powerhouses. And the prosecution witnesses themselves attributed this benefit to McMahan's and Price's actions in increasing the union's membership.

In considering this issue calling for a construction of the Mail Fraud Statute and Landrum-Griffin Act, this Court must keep in mind that this case involves not a government official and servant, but a leader of an association of laborers employed by private construction companies, whose conduct is to be guided by that organization's constitution and bylaws. This Court should also take notice that this is not a traditional labor official fraud/embezzlement case involving looting of extraordinary sums from the union treasury, which the union members lost.

It is respectfully submitted that the United States Court of Appeals for the Fourth Circuit erred in not following the holdings of the Third, Fifth and Eighth Circuits, in requiring allegation and proof of economic loss, and that accordingly the Court of Appeals' decision herein should be reversed.

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit in this case conflicts and contravenes the decisions of this Court, is in conflict with decisions of other United States Courts of Appeals, and, for the reasons stated, Petitioners urge that this Court grant the Writ of Certiorari.

Respectfully submitted,

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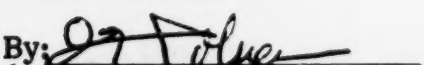
By: 
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October 15, 1986.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 85-5040

United States of America,

Appellee,

versus

Charles D. Price,

Appellant.

No. 85-5041

United States of America,

Appellee,

versus

Herman O. McMahan,

Appellant.

Appeal from the United States District Court of South Carolina, at Charleston. C. Weston Houck, District Judge.

Argued: November 8, 1985 Decided: April 14,1986

Before WIDENER and PHILLIPS, Circuit Judges, and HILTON, United States District Judge for the Eastern District of Virginia, sitting by designation.

Coming B. Gibbs, Jr.; Anthony F. Gonzalez (Gibbs & Holmes; Samuel R. Mandelbaum on brief) for Appellants; Dale L. DuTremble, Assistant United States Attorney (Vinton D. Lide, United States Attorney on brief) for Appellee.

APPENDIX A

HILTON, District Judge:

In 1978, Herman McMahan was elected business manager of Local 601 of the International Iron Workers Union in Charleston, South Carolina. As business manager, McMahan's duties included representing the union to the public, negotiating contracts with contractors, and recruiting new members. During all times relevant to this case, Charles Price was the elected business and financial agent of Local 808 of the International Iron Workers Union in Orlando, Florida. As business agent, his duties and obligations substantially mirrored those of McMahan.

When McMahan was elected business manager, Local 601 was over $30,000 in debt to the International Union. By 1984, the financial situation of Local 601 had improved significantly; so much so, that the debt to the International Union was paid off in full and a new union hall was constructed.

The dramatic improvement in the financial well-being of Local 601 was due in part to McMahan signing up new members from outside of South Carolina. In 1981, opponents within the union alleged that these new members' credentials were not being properly examined

prior to their admission to the union. As a result, the International sent an examiner to Local 601 to investigate these complaints. Union records show that the examiners did investigate the complaints and found no violations of union rules and none were reported by the examiner.

In February 1982, agent James Settle of the Federal Bureau of Investigation began to investigate the membership application process at Local 601. As a result of Settle's investigation, a Federal Grand Jury in Charleston, South Carolina, returned an indictment against, among others, Herman McMahan and Charles Price, appellants herein.

The indictment charged that McMahan, as business agent for Local 601, was responsible for certifying to the International Union that applicants were qualified and to insure the "proper use, preparation and transmittal of all the membership applications." It was alleged that the defendants engaged in a "scheme or artifice to defraud the union and its members of their right to McMahan's and Price's faithful and disinterested performance of official duties, free from corruption, partiality, dishonesty and fraud," in violation of 18 U.S.C. §1341. It was further alleged that the defendants

"embezzled and converted to their own use monies, properties and other assets of the local unions, that is, the Form 7 membership application in exchange for sums ranging from $500 to $1,000, a portion of which they aplied to their own benefit," in violation of 29 U.S.C. § 501(c). Lastly, the indictment charged the defendants with one count of conspiring to commit mail fraud and to embezzle union property in violation of 18 U.S.C. § 371.

The details of the scheme to defraud, as alleged in the indictment, were that Price would recommend certain workers for membership and would then obtain three blank money orders for payment of the alleged membership fees. These members would be recommended to Local 601 by Price and McMahan would approve the applications and in turn receive monies "over and above the fees set by the union." In furtherance of this scheme, the defendants caused a Form 7 membership application, for which they had received monies in excess of the set fees, to be delivered through the U.S. mails to the International. The embezzlement counts were premised on the allegations that the defendants embezzled and converted to their own use, the Form 7 application, in exchange for sums in excess of the set

fees, and that the excess was applied to their own use and benefit.

On August 23, 1984, the defendants were arraigned and entered pleas of not guilty to all charges. A motion to dismiss the indictment was filed on September 12, 1984, claiming that counts one through sixteen failed to charge the elements of mail fraud because there was no allegation of financial loss to the union. It was further stated that the indictment failed to properly allege the elements of the offense of embezzlement. These motions were denied.

A jury trial of this cause was held before Judge C. Weston Houck on October 19, 1984 through November 12, 1984. At the close of all the evidence, Judge Houck granted judgments of acquittal on three of the mail fraud counts and three of the embezzlement counts; eliminating six counts against McMahan and two against Price. Later, Judge Houck directed a verdict on an additional mail fraud count and an additional embezzlement count against Price alone.

The jury returned a verdict of guilty against McMahan on twenty-three counts and nineteen counts against Price. Both filed timely notices of appeal.

On appeal, the defendants raised numerous assignments of error. They first contend the District Court erred in not granting judgments of acquittal as to all counts in the indictment against McMahan and Price because the union investigator had previously found no violation. This finding, they assert, would serve as a bar to a subsequent federal criminal prosecution. We disagree.

Criminal laws are not passed by the legislature solely for the benefit of individual citizens or individual organizations but for the good of the public as a whole. Only a duly appointed or elected prosecutor representing the public is empowered to decide whether to bring charges in a particular case. Additionally, one of the purposes of the Landrum-Griffin Act, of which 29 U.S.C. § 501(c) is a part, was "to expose conflicts of interests and to stamp out embezzlement and self dealing by union officials." McNamara v. Johnston, 522 F.2d 1157, 1163 (7th Cir. 1975). Were federal prosecutors to be barred from indicting and prosecuting union officials for such conduct by a finding of no violation by a union investigator, the intent of the Landrum-Griffin Act would be undermined. Enforcement of criminal statutes cannot

depend upon the outcome of internal investigations by autonomous labor unions. Therefore, we find no error in the district court's denial of judgments of acquittal based upon the union's findings of no violation.

Appellants next contend that the trial judge erred in denying their motion for judgment of acquittal on the mail fraud counts because a financial loss and detriment to the union was neither alleged nor proven.

The indictment alleged that Price and McMahan devised a scheme to defraud the union of their "faithful and honest services." This allegation, they claim, is deficient because the government, to support a conviction under 18 U.S.C. § 1341, must prove economic loss or injury to the union as an essential element of the crime of mail fraud.

In United States v. McNeive, 536 F.2d 1245 (8th Cir. 1976), the court noted that:

> . . . In interpreting the language of the mail fraud statute, courts have identified numerous types of schemes that are violative of the statute. These various schemes fall broadly into two categories.
>
> The first category, which comprises the bulk of mail fraud cases, includes the many deceptive schemes which are intended to defraud individuals of money or other tangible property interests. There can be little dispute

> that these schemes are within the scope of § 1341 since they involve calculated efforts to use misrepresentations and other deceptive practices to induce the innocent or unwary to give up some tangible interest. . .
>
> The second category of § 1341 deceptive schemes is comprised of those which oeprate to deprive individuals of intangible rights or interests . . . This expansive interpretation was deemed justified since limiting § 1341 to deprivations of tangible interests alone would weaken the efficacy of the statute by excluding from its scope the multifarious schemes which deprive innocent victims of significant, often constitutionally protected, intangible rights.

536 F.2d at 1248, 1249. Cited with approval in United States v. Mandel, 591 F.2d 1347, 1361 (4th Cir. 1979), conviction aff'd in relevant part, 602 F.2d 663 (4th Cir. 1979) (en banc), cert. denied, 445 U.S. 961 (1980).

It is clear that intangible rights may be the target of a scheme to defraud under 18 U.S.C. § 1341. In Mandel, Marvin Mandel, Governor of the State of Maryland, and others, were indicted for mail fraud and racketeering. The mail fraud counts charged that the defendants had devised a scheme and artifice "to defraud the citizens of the State of Maryland, and its governmental departments, agencies, officials and employees, both executive and legislative, of their right to the conscientious, loyal, faithful, disinterested and

unbiased services, actions and performance of official duties of Marvin Mandel, in his official capacities as Governor of the State of Maryland." Mandel at 1353. This court noted in Mandel that "at this late date, there can be no real contention that many schemes to defraud a state and its citizens of intangible rights, e.g., honest and faithful government, may not fall within the purview of the mail fraud statute." Mandel at 1362. see also, United States v. Barber, 668 F.2d 778 (4th Cir. 1982), cert. denied 459 U.S. 829 (1982) United States v. Shamy, 656 F.2d 951 (4th Cir. 1981) cert. denied. U.S. 939 (1981).

An elected union official who owes the union members and the public in general faithful and honest services should not be treated any differently, nor held to any different standard. In such a case economic injury need not be shown because the harm caused "lies in the fact that the public official is not exercising his independent judgment in passing on official matters." Mandel at 1392. Thus, the union and its members were not receiving what they were entitled to, that is the honest and faithful services of their officials in the exercise of their official duties. It is in this way that the union was defrauded in this case, and because the mails

were used in furtherance of that scheme, we affirm the convictions under 18 U.S.C. § 1341.

Appellants next contend that the trial judge erred in admitting government's exhibit number 10 in evidence because it was not properly authenticated.

Government exhibit 10 consisted of two notes which read as follow:

> Herman, each man, three months dues, $300 each book. Rest for you.
>
> Thanks.
> Charlie Price

> Herman, give each man three months dues, rest is for you.
>
> Thanks.
> Charles or Charlie.

The exhibit also contains several pages of photocopies of checks and money orders from Local 601 members. Some of these checks and money orders were deposited into McMahan's bank account.

Rule 901(a) of the federal Rules of Evidence states that "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims."

"The sufficiency of a showing of authenticity

of a document sought to be introduced into evidence is a matter residing in the sound discretion of the trial judge." United States v. Sutton, 426 F.2d 1202, 1207 (D.C. Cir. 1969). In this case, much testimony was given that corroborated the contents of the two notes. Individuals named in the indictment had paid fees in excess of the set fee of $300. Those who paid more than the set fee were members of Local 601 in Charleston. Price spoke with several men as to the means by which one could become a member of the union, and the fees discussed were always in excess of the set fee. Also, blank money orders were always utilized.

Thus, the record is replete with testimony that would support a finding by the trial judge that the matter in question is what the proponent claims. The trial judge listened to all the government's evidence before admitting exhibit number 10 and we find no abuse of discretion in the trial judge's decision to admit that exhibit.

Lastly, appellants allege that the trial court erred in denying their motions for judgment of acquittal on the embezzlements counts. They claim there was no evidence to show that the Form 7 membership applications were the property of the union and no

evidence to show that any forms were used without union authorization.

29 U.S.C. § 501(c) provides:

> Any person who embezzles, steals or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000.00 or imprisoned for not more than five years or both.

To establish a violation of this section the government must prove that the defendants embezzled or converted to their own or another's use, the funds or property of a labor union. United States v. Gibson, 675 F.2d 825 (6th Cir. 1982), United States v. Dibrizzi, 393 F.2d 642 (2nd Cir. 1968). The indictment, in this case, alleged that the appellants did "embezzle property and other assets of the union, to wit: Form 7, in exchange for sums ranging from $500 to $1,000, a portion of which they applied to their use and benefit." The evidence reveals that Price referred persons to McMahan for membership in Local 601. As a part of the membership process, the applicant filled out a Form 7 membership application.

The application was returned along with the normal fee of $300.00 to the union. In addition to the $300.00 fee to the union, additional sums were assessed with each application; this excess was split between Price and McMahan. None of the union funds were taken or used by the appellants but were paid over to the union as required. Nor were any Form 7 applications taken or used by the appellants for any purpose other than taking applications for membership which were forwarded on to the union. There was no evidence that the forms were altered or falsified in any manner.

Congress, in enacting 29 U.S.C. § 501(c), created a federal crime yet the terms used in the legislation retain their common law meaning. Woxberg v. United States, 329 F.2d 284, 290 (9th Cir. 1964). The Supreme Court in Moore v. United States, 160 U.S. 268, 270 (1895), defined embezzlement as "the fraudulent appropriation of property by a person to whom such property has been intrusted, or into whose hands it has lawfully come."

In this case there was no evidence of application forms, or converting of application forms for the use of the appellants. The forms were used for the

exact purpose for which they were intended. Applicants for membership in local 601 filled out the forms, as required by the union, and they were forwarded to the union in due course. There was no evidence that any of the forms were taken by the appellants or used by the appellants for any purpose other than receiving applications. There was no evidence that the forms were altered or falsified. The fact that the appellants received a fee for themselves in addition to that required by the union does not change the fact that the form was properly used. Nor does the taking of a fee create an appropriation of an application which was used for its intended purpose in the union's business.

The government argues that the holding in United States v. Robinson, 512 F.2d 491 (2nd Cir. 1975) must control our decision. In Robinson, the defendant was an elected union official who acted as a liaison between seamen aboard ships in port and the shore-based union officers. His particular responsibility was to handle the processing of seamen into groups to be offered priority jobs. The government's proof established that Robinson returned six forms which contained false entries of Robinson, aided and abetted by others, did in fact convert

forms which were property of the union. The court upheld the conviction citing United States v. Silverman, 430 F.2d 106 (1970) which held that in enacting 29 U.S.C. § 501(c) Congress had gone beyond the common law offense of larceny and the statutory crime of embezzlement.

Indeed 29 U.S.C. § 501(c) goes beyond common law larceny and statutory embezzlement by adding the language "and willfully abstracts or converts to his own use" any union property. In Robinson, the defendant falsified and misued union forms. He forged the forms in contravention of union procedures to obtain moneys and in doing so converted them to his own use and personal benefit.

In this case there is no evidence of any converting to their own use by either appellant. There were no false or fraudulent applications. There was no evidence that the forms were taken or converted to any use other than the use called for by the union. There was no embezzlement of the forms as charged in the indictment. The offense in this case was the receiving of additional fees in connection with a proper application procedure, but not embezzlement as charged under 29

u.S.C. § 501(c). Those counts must therefore be dismissed.

AFFIRMED IN PART:

REVERSED IN PART.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Nos. 85-5040
85-5041

United States of America,

Appellee,

versus

Herman E. McMahan
and Charles D. Price,

Appellants.

ORDER

There having been no request for a poll of the court on the petitioners for rehearing en banc, it is accordingly ADJUDGED and ORDERED that the petitions for rehearing en banc shall be, and they hereby are, denied.

The panel has considered the petitions for rehearing and is of the opinion the same are wtihout merit.

It is accordingly ADJUDGED and ORDERED that the petitions for rehearing shall be, and they hereby are, denied.

With the concurrences of Judge Phillips and Judge Hilton.

s/
For the Court

Supreme Court, U.S.
FILED
DEC 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-632

In the Supreme Court of the United States

OCTOBER TERM, 1986

HERMAN E. MCMAHAN AND CHARLES D. PRICE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a conviction for mail fraud under 18 U.S.C. 1341 requires proof of economic harm to the victim of the fraud.

2. Whether the court of appeals, having ruled that petitioners' misuse of labor union application forms did not constitute embezzlement within the meaning of 29 U.S.C. 501(c), should have reversed petitioners' mail fraud convictions, which were based on petitioners' abuse of their fiduciary duties as elected labor union officials.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 19-34) is reported at 788 F.2d 234.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1986. Petitions for rehearing filed by petitioners and by the government were denied on August 20, 1986. The petition for a writ of certiorari was filed on October 16, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioners were convicted on one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371, and on several counts of mail fraud, in violation of 18 U.S.C. 1341, and embezzle-

ment of union property, in violation of 29 U.S.C. 501(c). Petitioners were sentenced to concurrent terms of one year's imprisonment on all counts.

1. At trial, the government established that petitioners, in their capacity as elected officials of local chapters of the International Iron Workers' Union, exacted payments from applicants for union membership in excess of the union membership fees and dues and kept the excess monies they received (Pet. App. 21-23). Applicants for union membership would provide petitioner Price with blank money orders for payment of the fees. Price would then recommend the applicants to petitioner McMahan for membership in McMahan's local chapter (*id.* at 22). McMahan would approve the applications and fill in the money orders in amounts that exceeded the union's membership fees and dues (*ibid.*). Petitioners and their coconspirators would then retain the overpayments for their personal use (*ibid.*). Petitioners also prepared or caused the preparation of membership applications on union application forms, often including information that was untrue. Petitioners then caused the application forms to be mailed to the union (*id.* at 23). Petitioners' recruitment efforts increased the membership of petitioner McMahan's local union chapter and, as a result, had the incidental benefit of improving the financial condition of the chapter (*id.* at 20).

2. On appeal, the court of appeals rejected (Pet. App. 25-28) petitioners' claim that their mail fraud convictions—which were based on the mailing of the application forms—must be reversed because the government had failed to prove a financial loss to the union. According to the court, the loss of intangible rights was a sufficient basis for a mail fraud conviction. It was enough, the court observed, that "the union and its members were not re-

ceiving what they were entitled to, that is the honest and faithful services of their officials in the exercise of their official duties" (*id.* at 27-28).

The court of appeals agreed, however, with petitioners that their convictions on multiple counts of embezzling union property in violation of 29 U.S.C. 501(c)—based on their misuse of the union applications forms—should be reversed (Pet. App. 29-34). The court concluded that no union property had been embezzled because the application forms had been used for their intended purpose, and because the union had in each instance received the amount of membership fees and union dues that it had requested (*id.* at 31-34).[1]

DISCUSSION

1. Petitioners raise (Pet. 13-17) the question whether the convictions of union officials for mail fraud under 18 U.S.C. 1341 requires proof of economic harm or whether, as the court of appeals held, the convictions may be based on the loss of "intangible rights"—in this case, the deprivation of petitioners' faithful and honest services in their capacity as elected union officials. This Court recently granted certiorari in a case that raises an issue similar to the one raised in this case. See *McNally* v. *United States,* No. 86-234 (consolidated with *Gray* v. *United States,* No. 86-286). The *McNally* case arises from the prosecution of two individuals who participated in a kickback scheme in-

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[1] The court of appeals' opinion states that "[a]s part a of the membership process, the applicant filled out a * * * membership application" (Pet. App. 30) and "[t]here was no evidence that the forms were altered or falsified in any manner" (*id.* at 31). In its petition for rehearing, the government brought to the court of appeals' attention the evidence before the jury that the applicants had not completed their own forms, and that virtually all the forms contained false information. See Gov't Pet. for Reh'g 4-5.

volving a public official and a political party leader. The fraud alleged in *McNally,* like the fraud alleged in this case, was based on the deprivation of the victims' rights to the defendants' performance of their fiduciary obligations. Because the Court's decision in the *McNally* case may bear on the issue presented in this case, we submit that the Court should hold the petition in this case pending its disposition of the *McNally* case.

2. Petitioners also claim (Pet. 7-12) that this Court's decision in *Yates* v. *United States,* 354 U.S. 298 (1957), requires reversal of their mail fraud convictions. Petitioners contend that the court of appeals was correct in ruling that their conduct did not violate 29 U.S.C. 501(c), but that the flaw in the Section 501(c) counts tainted the mail fraud counts because the jury may have relied on the illegality of their conduct under Section 501(c) as a basis for convicting them on the mail fraud counts. Petitioners' reliance on *Yates* is misplaced. In *Yates* the Court could not determine whether the jury had based its conspiracy conviction on conduct that was not in fact illegal. In this case, by contrast, there is no such ambiguity.

Unlike in *Yates* and the court of appeals' decisions on which petitioners rely, the jury in this case did not have before it an alternative theory of prosecution under which the jury's verdict would have been invalid. The embezzlement counts that the court of appeals reversed depended on the misuse—in effect, the theft—of union *property.* The mail fraud counts were not based on a theft of property theory, but were based on petitioners' failure to provide the union their loyal, faithful and honest services in their capacities as elected union officials. The jury instructions made that distinction clear to the jury. Hence, there is no basis for concern that the jury may have relied on an

improper embezzlement theory in convicting petitioners of mail fraud.[2]

---

[2] The district court charge to the jury regarding the mail fraud counts provided, in pertinent part (Tr. 1609-1610):

> I'd like to explain to you the scheme that the government contends is involved in this matter.
>
> In many instances the scheme alleged in a criminal prosecution for mail fraud involves a scheme to defraud someone of property or money. That, however, is not the case here. This scheme is not a scheme to defraud [the] union * * * or anybody else of money. In addition to covering a scheme that would charge someone of defrauding someone of money or property, the mail fraud statute also prohibits schemes to defraud individuals of what we will refer to as intangible interests or rights, and the schemes charged in this indictment fall within that category.
>
> The intangible rights that the government in this case alleges, the scheme in question, involved, are the rights of [the union] to have the loyal, faithful and honest performance of services by its elected official, the defendant, Herman E. McMahan, its business agent and financial secretary.
>
> This is not a scheme, according to the allegations of the indictment, and that's the only crime charged, to take union money or to take union property. The allegations of the indictment charge these defendants with mail fraud in devising and participating in, and using the mail in furtherance thereof, a scheme to deprive [the local union chapter] of the loyal, faithful and honest service of its elected business agent and financial secretary.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *McNally* v. *United States,* No. 86-234, and *Gray* v. *United States,* No. 86-286.

Respectfully submitted.

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DECEMBER 1986

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